88-1229

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF OHIO
Petitioner

-vs-

JAMES A. BOWE and
WAYNE R. ADKINS

Respondents

PETITION FOR A WRIT OF CERTIORARI
To The Ninth District Court of Appeals
For Summit County Ohio

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51 pp

QUESTION PRESENTED

I. "[A]N IMPORTANT FACTOR TO BE CONSIDERED IN DETERMINING WHETHER ANY EXIGENCY EXISTS IS THE GRAVITY OF THE UNDERLYING OFFENSE FOR WHICH THE ARREST IS BEING MADE." WELSH V. WISCONSIN (1964), 466 U.S. 740, 753. DOES THE OHIO STATUTORY DEFINITION OF A CRIME AS AN OFFENSE OF VIOLENCE AND AN AGGRAVATED FELONY OF THE FIRST DEGREE [OHIO'S MOST SERIOUS CRIME ABSENT A MURDER OR CAPITAL OFFENSE], CONCLUSIVELY ESTABLISH THIS OFFENSE AS A SERIOUS OFFENSE UNDER THE WELSH STANDARD?

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This Court should determine under Welsh v. Wisconsin, 466 U.S. 740, 753 (1984), that reviewing courts must look to their State Penal Code in determining whether the offense is a serious offense that will support a warrantless search by the police.---------- 12

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF OHIO
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-vs-

JAMES A. BOWE
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PETITION FOR A WRIT OF CERTIORARI
To The Ninth District Court of Appeals
For Summit County, Ohio

OPINIONS BELOW

The Decision of the Supreme Court of the State of Ohio denying jurisdiction is reproduced in the Appendix of the Petition at pages 21-22 .

The Decision of the Court of Appeals for the Ninth District reversing the judgement of the trial court of Summit County is reproduced in the Appendix at pages 23-34 .

The Decision of the Summit County Court of Common Pleas refusing to suppress the evidence is reproduced in the Appendix at pages 35-37 .

JURISDICTIONAL STATEMENT

Petitioner respectfully requests this Court to invoke jurisdiction under 18 U.S.C. 1257(3). The Court of Common Pleas for Summit County on December 4, 1987, refused to suppress the evidence in this case finding that it was properly seized under the Fourth Amendment. After Defendants' convictions for Aggravated Burglary, the convictions were reversed by the Court of Appeals for the Ninth Judicial District on August 24, 1988. The Appellate Court found that the evidence was improperly seized under the Fourth Amendment. The Supreme Court of Ohio refused to take jurisdiction of this

case on November 23 and December 21, 1988. Petitioner prays that this Court grant the Writ of Certiorari for the reason that a state court in the instant case has incorrectly decided an important federal question that must be settled by this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions Involved

U.S. Const., Amend. IV

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATUTES INVOLVED

O.R.C. 2901.01(I)(1) [Definitions]
Reproduced at Page 38.

O.R.C. 2911.11 Aggravated burglary.
Reproduced at Page 39.

O.R.C. 2929.11 Penalties for felony.
Reproduced at Page 40-46.

STATEMENT OF THE CASE

The Defendants were indicted for one count of Aggravated Burglary with a prior Aggravated Felony Specification. Both Defendants were prosecuted pursuant to the Career Criminal Program of the Summit County Prosecutor's Office. Prior to trial, the Defendants filed a Motion to Suppress Evidence that was seized by the police. The trial court overruled the Defendants' Motion to Suppress finding that the evidence was properly seized by police. On December 4, 1987, a jury trial was held before the Honorable Judge Winter. After deliberating 50 minutes, the jury found both Defendants guilty of Aggravated Burglary. The trial court then found both the Defendants guilty of the Specification. The trial court sentenced Defendant Adkins to twelve to twenty-five (12-25) years in the Ohio

State Penitentiary. Defendant Bowe was sentenced to ten to twenty-five (10-25) years in the Ohio State Pentitentiary.

The Defendants appealed their convictions to the Ninth District Court of Appeals. On August 24, 1988, the Ninth District Court of Appeals reversed Defendants' convictions finding that the trial court committed error in overruling Defendants' Motion to Suppress Evidence. The Ohio Supreme Court refused to take jurisdiction of the Defendants' case on November 23, 1988, and December 21, 1988. The State now seeks a Petition for a Writ of Certiorari from this Court.

STATEMENT OF THE FACTS

Patricia Ann Wagner lives at 1857 Sixteenth Street in Akron, Ohio. On October 5, 1987, at approximately 3:00 p.m., Defendant Adkins came to her door and asked her if she was giving away free kittens. Ms. Wagner responded that she did not have any kittens but believed her neighbor across the street may have some free kittens. Defendant Adkins left with another man and went across the street to Cheryl Clark's house. After knocking on the door and finding that nobody was home, the two men walked to the side of the Clark house. A short time later, Ms. Wagner saw Defendant Adkins and the other man walking up the street. Defendant Adkins was carrying a clothes basket and the other man was carrying a bag. As the two men were walking away, Ms. Clark returned to her home and pulled into her

driveway. When Ms. Clark entered her home she found many of her possessions had been stolen. Ms. Wagner called the police who arrived at the Wagner residence within two minutes of her phone call.

Mr. Kirk Lawson lives at 952 Indian Trail in Akron, Ohio, which is two houses down from Sixteenth Street. On October 5, 1987, at approximately 3:20 p.m., Mr. Lawson saw two men in his back yard coming from Sixteenth Street. One man was carrying a laundry basket and the other man was carrying a paper bag. Mr. Lawson relayed this information to his neighbor, Edward Reese, who was trying to locate the burglars in his car. Mr. Reese found Defendant Bowe and Defendant Adkins and observed them walking up Indian Trail. Mr. Reese observed the two men put the basket and the bag into a car and drive away. Mr.

Reese wrote down the license plate number of the car and gave it to the police.

The police traced the license plate number of the car and found that it belonged to a Michael Forester who lived at 24 East Moore Street in Akron, Ohio. The police interviewed Mr. Forester who indicated that the car was being used by his brother, Pat Forester, who lived on Ira Avenue. The police went to Ira Avenue where they found the car that was used by the Defendants. Pat Forester told the police that a friend who lives across the street in an upstairs apartment had just used his car. He further added that he had just seen the man exit his car carrying a basket.

At approximately 4:00 p.m., the police went over to Mr. Bowe's apartment and knocked on his door. The police got no response but learned there was a

vicious dog in the apartment. The police did not enter Mr. Bowe's apartment because they were afraid of the vicious dog. The police decided to wait for a dog warden who had been called to remove the dog. Defendant Bowe's mother lived in the downstairs apartment and the police asked her if she would knock on the door and find out if anybody was home. Mrs. Bowe told the police that she got no response and that nobody was home. A friend of Mr. Bowe's who was just passing by told the police that he could control the dog and took the dog out of Mr. Bowe's apartment. A second passerby indicated that he knew Mr. Bowe and could talk him out of his apartment. After two minutes, the individual returned and told the police that Mr. Bowe would come out of the apartment voluntarily. Mr. Bowe then walked out of the apartment, surrendered

to the police, and was then placed under arrest. Mr. Lawson and Mr. Reese identified Mr. Bowe as the person they had seen leaving the neighborhood.

The police read Defendant Bowe his Miranda rights and Mr. Bowe indicated that he did not know anything about a burglary.

At approximately 5:00 p.m., the police went into Mr. Bowe's apartment to find the second man that had committed the burglary. The police searched in the closets, under beds, and under furniture for the second suspect but did not find him. The police then searched the apartment a second time and found Defendant Adkins hiding in a walk-in closet covered by a number of items including two VCR's. During their search for Defendant Adkins, the police saw a number of items in the closet which matched the items that were taken

from Ms. Clark's residence. Ms. Clark was taken up to the apartment where she identified cameras, VCR's and jewelry that were stolen from her house. Ms. Clark recovered all of her stolen property except for some video tapes and two radios. Mr. Reese identified Defendant Adkins as the other person he saw leaving the neighborhood with Mr. Bowe. The police later learned that Defendant Adkins was living with Mr. Bowe in Mr. Bowe's apartment.

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD DETERMINE UNDER WELSH V. WISCONSIN, 466 U.S. 740, 753 (1984), THAT REVIEWING COURTS MUST LOOK TO THEIR STATE PENAL CODE IN DETERMINING WHETHER THE OFFENSE IS A SERIOUS OFFENSE THAT WILL SUPPORT A WARRANTLESS SEARCH BY THE POLICE.

In Welsh v. Wisconsin, 466 U.S. 740, 753 (1984), this Court held that the seriousness of the offense is an important factor in determining whether exigent circumstances justified the warrantless search. Here, the Defendants were indicted for Aggravated Burglary, an Aggravated Felony of the first degree. O.R.C. 2911.11. An Aggravated Felony is Ohio's most serious offense absent a murder or capital crime. O.R.C. 2929.11. Further, Aggravated Burglary is defined as an offense of violence under the Ohio Revised Code. O.R.C. 2901.01(I)(1).

In the case at bar, the Defendants argued that the evidence should be

suppressed because the search of Defendants apartment was conducted without a warrant. The trial court overruled Defendants' motion finding that the search was based upon exigent circumstances. [Trial Court's Findings, Appendix at page 35.] The Court further indicated that the Defendants' crime, Aggravated Burglary, was a crime of violence. [Trial Court's Findings, Appendix at page 35.] The Court then found exigent circumstances based on the test set forth in Dorman v. U.S., 435 F.2d 385 (C.A.D.C. 1970).

The Ninth District Court of Appeals reversed the trial court's findings and suppressed the evidence. The Appellate Court followed Welsh v. Wisconsin, 466 U.S. 740 (1984), and indicated that the seriousness of the offense was an important consideration in determining whether exigent circumstances were

present. However, the court reversed the trial court's findings and suppressed the evidence holding that Aggravated Burglary was not a serious offense or an offense of violence:

> "[A]n important factor to be considered in determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." Welsh v. Wisconsin (1984), 466 U.S. 740, 753. It has been held that a burglary without a weapon is not a grave enough offense to permit a warrantless home search or arrest. People v. Sanders (1978), 57 Ill. App. 3d 6, 374 N.E. 2d 1315 (cited in Welsh, supra, at 752). In the instant case, no violence was involved; there was no testimony that the appellants were armed at the time they burglarized the home or while they were in the apartment. Thus, the first two factors under Dorman were not present in this case.
>
> Appellate Court's Decision, Appendix at page 31 .

The State contends the Ohio Revised Code must control the determination of whether Aggravated Burglary is a serious

offense or crime of violence. In Welsh, this Court looked to the Wisconsin Statutory Code in determining that Driving under the Influence was not a serious offense and did not support a warrantless search of a home. Id. at 754. In N.Y. v. Odenweller, 527 N.Y.S. 2d 127 (1988), the New York Supreme Court found that Driving under the Influence was a serious offense. The New York Court distinguished the case of Welsh v. Wisconsin, noting that the State of New York punished intoxicated drivers much more severely than the State of Wisconsin. Id. at 129. Based on New York's Statutory Law, the Court found that Driving under the Influence was a serious offense and upheld the warrantless search by the police. Id. at 129-130.

The State contends that the Appellate Court in this case erred in holding that

Aggravated Burglary was not a serious offense or an offense of violence. The State was prejudiced by this error since the record indicates the search was based on exigent circumstances. The police were at the Defendant's home only one half hour after the Aggravated Burglary was committed. The record indicates that the police believed they were in a dangerous situation when they were outside of Mr. Bowe's apartment. There was testimony that the police officers outside the apartment were fearful for their safety and believed that the Defendants could be armed. Officer Micire testified as follows:

> Q. Had you seen those during the first search or coming out or when?
>
> A. No. During the first sweep we were looking for the two suspects. We had no idea if they were armed or so forth and so on

and our main concern was to secure the area or anybody that would hurt anybody.

Considering that the Defendants had committed an Aggravated Burglary only one half hour earlier, it was not unreasonable to believe that the Defendants could be armed. Further, the police delayed entering Mr. Bowe's apartment for one half hour because they feared for their safety. Defendant Bowe kept a vicious dog (pit bulldog) in his apartment and the police sought a dog warden to remove the dog before entering the apartment. Also, the police sought to avoid a violent confrontation with the Defendants by having Mr. Bowe's mother and then a friend talk Mr. Bowe out of the apartment.

Further, the Defendants were in possession of several items of property stolen from the victim's house that could be easily destroyed. The victim

testified that jewelry, earrings, cigarettes, and shirts were stolen from her home. Some stolen property including eight video tapes and two radios were never recovered by the victim. Finally, the record indicates that Mr. Adkins attempted to escape arrest by hiding from the police.

Since the instant search was supported by exigent circumstances, and the Defendants had committed a very serious crime under Ohio Law, the evidence in this case was properly seized and should not have been suppressed by the Appellate Court. This Court should grant Certiorari in this case to indicate that under the Welsh standard, reviewing courts must look to their own State Penal Code in determining whether the offense is a serious offense.

CONCLUSION

In Welsh v. Wisconsin, 466 U.S. 740 (1984), this Court determined that the seriousness of the underlying offense is an important factor in determining whether a search is based upon exigent circumstances. The State asserts that reviewing courts must apply their own state penal code in determining the seriousness of the offense under the Welsh standard. Therefore, the State requests this Court to grant Certiorari and find that Aggravated Burglary is a serious offense under the Ohio Revised Code.

Respectfully submitted,

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A P P E N D I X

THE SUPREME COURT OF OHIO
COLUMBUS

1988 TERM

To Wit: November 23, 1988

STATE OF OHIO :
Appellant, : Case No. 88-1781

v. : E N T R Y

JAMES A. BOWE :
Appellee :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Summit County, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Lynn C. Slaby.

THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO
COLUMBUS

1988 TERM

To Wit: December 21, 1988

STATE OF OHIO :
Appellant, : Case No. 88-1779

v. : E N T R Y

WAYNE R. ADKINS :
Appellee :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Summit County, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Lynn C. Slaby.

(Court of Appeals No. 13505)

THOMAS J. MOYER
Chief Justice

STATE OF OHIO))SS: COUNTY OF SUMMIT)		IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT C.A. NO. 13494 C.A. No. 13505
STATE OF OHIO Plaintiff-Appellee -vs- JAMES E. BOWE and WAYNE R. ADKINS Defendants-Appellants)	)	APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF SUMMIT, OHIO CASE NO., CR 87 10 1282

DECISION AND JOURNAL ENTRY

Dated: August 24, 1988

These causes was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CACIOPPO, J.

On October 5, 1987, a home located at 1854 16th St., Akron, Ohio, was broken into. Kirk Lawson told police he observed two males going through the yard in that vicinity and gave the

police a description of the men. Ed Reece reported to the police that he observed two males leave in a car and gave the police the license plate number. Police went to the address of the license plate registrant. Reece and Lawson were taken to Ira Avenue to view possible suspects. They arrived at 313 Ira Avenue, a house which consisted of two apartments, one upstairs and one downstairs. The police had secured the outside perimeter of the house, because they believed that the suspects were located in the upstairs apartment. From the time they received the license plate number, checked same and took witnesses to the address, no arrest warrant was obtained. The police heard the sound of a barking dog coming from the upstairs apartment and called trained personnel to remove the dog. However, before this personnel arrived, a passerby was

allowed to go to the upstairs apartment and remove the dog. Shortly thereafter, another passerby was allowed to go to the upstairs apartment and speak to the suspects. This person came down and told police the suspects would be right down. A few minutes later, appellant, James Bowe, emerged; he was identified by Reese and Lawson, arrested and read his Miranda warnings. Before obtaining a search warrant, four officers entered the apartment and searched for the other suspect, appellant, Wayne Adkins, who was discovered in a closet, covered with two VCRs and some bags.

Bowe and Adkins were charged with aggravated burglary. Both appellants made motions to suppress the evidence seized from the warrantless search. At the end of the suppression hearing, the state conceded that Bowe and Adkins lived at 313 Ira Avenue, and thus, had

standing to challenge the warrantless search. At the hearing, two officers testified that Bowe consented to the search of the premises. Bowe testified that he did not consent to the search and witnesses testified that police told Bowe that they had a search warrant on the way. Based upon this, the court found that there was no consent to the search of the premises.

However, the trial court upheld the search on the basis that there were exigent circumstances justifying the warrantless entry and search of the premises. The court found exigent circumstances to exist because there was a commission of a crime of violence, and the police had trustworthy information that the suspect was in the apartment and that he might escape. The appellants went to trial and the jury returned a verdict of guilty against

both on the charge of aggravated burglary and sentenced them accordingly. From this decision, both appellants appeal. The appellants' appeals were consolidated for argument.

ADKINS' FIRST ASSIGNMENT OF ERROR

> "The trial court erred in overruling appellant's motion to suppress the evidence seized in the warrantless search of appellant's residence, where there was no consent to search given, and there were no exigent circumstances justifying the entry into the premises and the subsequent search of the property and seizure of items found therein."

BOWE'S ASSIGNMENT OF ERROR

> "The trial court erred to the prejudice of the defendant-appellant by overruling defendant-appellant's motion to suppress evidence seized by the police at 313 Ira Avenue, Akron, Ohio, on October 5, 1987, since such evidence was seized in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution."

It is unconstitutional for the police to make a warrantless and nonconsensual

entry into a suspect's home in order to make a routine felony arrest, absent exigent circumstances. Payton v. New York (1980), 445 U.S. 573. Warrantless searches are per se unreasonable absent specific exceptions. Mincey v. Arizona (1978), 437 U.S. 385, 390. In Mincey, the court noted the exceptions to the warrant requirement justifying a warrantless entry and search of the home.

The first such exception is an "emergency situation". Such a situation arises when a person in the home is in need of "immediate aid" or there is a situation "threatening life or limb". Id. at 392-393. Nothing in the record indicates that the emergency exception applies to this case. No one was in need of immediate aid and the actions of the police allowing civilian passersby to enter the appellants' apartment

destroys any argument that this was a situation threatening life or limb.

The second exception noted in Mincey is where the search was incident to a lawful arrest. In the instant case, the search was conducted to locate and apprehend Adkins, thus, this exception is not applicable to this case.

A third exception is "hot pursuit". In Warden v. Hayden (1967), 387 U.S. 294, the police entered a home less than five minutes after the entry of an armed robber. The United States Supreme Court approved this entry because delay would have gravely endangered the lives of the police or the lives of others. Id. at 298-299. In the instant case, there was no evidence that the police or others were endangered. In fact, their actions, discussed supra, destroy any argument that a dangerous situation existed.

Finally, the last exception noted in Mincey is where the evidence could easily be removed or destroyed. Here, the evidence (VCRs, cameras and radios) is not of a type easily destroyed, and the record does not reflect any indication that the police thought otherwise.

The trial court followed Dorman v. United States (C.A. D.C. 1970), 435 F.2d 385, which set forth six factors that would constitute an immediate major crisis mandating a warrantless entry of a home: (1) the offense involved is a crime of violence; (2) the suspect is reasonably believed to be armed; (3) a clear showing of probable cause to believe that the suspect committed the crime involved; (4) a strong reason to believe that the suspect is in the premises being entered; (5) the likelihood that the suspect will escape

if not apprehended; and (6) the entry, though not consented, is made peaceably. Id. at 392-393.

"[A]n important factor to be considered in determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." Welsh v. Wisconsin (1984), 466 U.S. 740, 753. It has been held that a burglary without a weapon is not a grave enough offense to permit a warrantless home search or arrest. People v. Sanders (1978), 57 Ill. App. 3d 6, 374 N.E. 2d 1315 (cited in Welsh, supra, at 752). In the instant case, no violence was involved; there was no testimony that the appellants were armed at the time they burglarized the home or while they were in the apartment. Thus, the first two factors under Dorman were not present in this case.

The third, fourth and sixth factors were present in this case. The police had reasonably trustworthy information that the persons in the apartment committed the burglary and the entry of the police was made peaceably. Finally, the fifth factor of a likelihood that the suspect would escape is not present. In the instant case, the police had secured all exits from the home. Due to this, it is not likely that Adkins could have escaped.

Thus, under Dorman and Mincey there were not exigent circumstances justifying the warrantless entry of the appellants' apartment. The court erred in denying the appellants' motions to suppress the evidence obtained from the warrantless search.

The appellants' first assignments of error are well taken.

ADKINS SECOND ASSIGNMENT OF ERROR

"The trial court erred in denying appellant's timely request for jury instructions as to the offenses of burglary and grand theft."

Due to our disposition of his first assignment of error, we need not discuss Adkins' final assignment of error.

The judgment of the trial court is reversed and the cause is remanded to the trial court for proceedings consistent with this opinion and law.

The Court finds that there were reasonable grounds for these appeals.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

MARY CACIOPPO
FOR THE COURT

BAIRD, P.J.
MAHONEY, J.
CONCUR

APPEARANCES:

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VINCENT J. ALFERA, Attorney at Law, 77 E. Mill St., Akron, OH 44308 for Defendants.

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO) CASE NO. 87-10-1282(A)(B)
)
Plaintiff,) C.A. NOS. 13494 & 13505
)
-vs-)
) Motion to Suppress
JAMES A. BOWE)
WAYNE R. ADKINS) Volume 1 of 3
)
Defendants.)

* * *

EXCERPT FROM TRIAL COURT PROCEEDINGS

Trial Courts Findings of December 4, 1987, regarding Motion to Suppress.

* * *

THE COURT: All right. Gentlemen, first the Court does find that there was no consent to search based upon the evidence presented.

Secondly, in reference to suppressing the identification of the Defendants, the Court finds and there have been numerous cases on one on one identification in the past and the Court finds that this identification was

valid, was not unnecessarily suggestive or conducive to irreparable mistaken identification.

The second part of the motion was on the suppression of any statement given and that has been made mute by the prosecutor saying no statement will be used on their case in chief.

Third, suppressing the evidence that was found in the search of this apartment. The Court finds that the police had a right to make that search in attempting to make an arrest of Adkins in that apartment.

The Court finds that there was exigent circumstances, that there was a commission of a crime of violence, the trustworthy information that they had showed that Adkins and I guess at that time they didn't know his name, but that he was on the premises and that he might escape.

Their evidence indicated that Adkins had committed a crime so the Court finds that the entry without permission was permissible under the law to effect the arrest of Adkins.

The testimony shows that the evidence that they found was in plain view and that was permissible also because it was in plain view. Therefore, I'm denying your motion to suppress. Basically it's based on Dorman.

Is there anything further?

* * *

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions Involved

U.S. Const., Amend. IV

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATUTES INVOLVED

O.R.C. 2901.01 Definitions

O.R.C. 2901.01(I)(1)

(1) "Offense of violence" means any of the following:

(1) A violation of sections 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2903.13, 2903.21, 2903.22, 2905.01, 2905.02, 2905.11, 2907.02, 2907.03, 2907.12, 2909.02, 2909.03, 2909.04, 2909.05, 2911.01, 2911.02, 2911.11, 2911.12, 2917.01, 2917.02, 2917.03, 2917.31, 2919.25, 2921.03, 2921.34, 2921.35, 2923.12, and 2923.13 of the Revised Code.

BURGLARY

O.R.C. 2911.11 Aggravated burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure, as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense, as defined in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, on or about his person or under his control;

(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

(B) Whoever violates this section is guilty of aggravated burglary, an aggravated felony of the first degree.

HISTORY; 134 v H 511 (Eff 1-1-74); 139 v S 199 (Eff 1-5-83); 140 v S210.Eff7-1-83.

PENALTIES FOR FELONY

2929.11 Penalties for felony.

(A) Whoever is convicted of or pleads guilty to a felony other than aggravated murder or murder, except as provided in division (D) or (E) of this section, shall be imprisoned for an indefinite term and in addition, may be fined or required to make restitution, or both. The indefinite term of imprisonment shall consist of a maximum term as provided in this section and a minimum term fixed by the court as provided in this section. The fine and restitution shall be fixed by the court as provided in this section.

Whoever is convicted of or pleads guilty to committing, attempting to commit, or complicity in committing a felony violation of section 2909.02 or 2909.03 of the Revised Code and is sentenced to an indefinite term of imprisonment shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

(B) Except as provided in division (D) of this section, section 2929.71, and Chapter 2925. of the Revised Code, terms of imprisonment for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the

United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be five, six, seven, eight, nine, or ten years, and the maximum term shall be twenty-five years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder, the minimum term shall be imposed as a term of actual incarceration of ten, eleven, twelve, thirteen, fourteen, or fifteen years, and the maximum term shall be twenty-five years;

(2) For an aggravated felony of the second degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be three, four, five, six, seven, or eight years, and the maximum term shall be fifteen years;

(b) If the offender has previously

been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of eight, nine, ten, eleven, or twelve years, and the maximum term shall be fifteen years;

(3) For an aggravated felony of the third degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be two, three, four, or five years, and the maximum term shall be ten years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of

actual incarceration of five, six, seven, or eight years, and the maximum term shall be ten years.

(4) For a felony of the first degree, the minimum term shall be four, five, six, or seven years, and the maximum term shall be twenty-five years;

(5) For a felony of the second degree, the minimum term shall be two, three, four, or five years, and the maximum term shall be fifteen years;

(6) For a felony of the third degree, the minimum term shall be two years, thirty months, three years, or four years, and the maximum term shall be ten years;

(7) For a felony of the fourth degree, the minimum term shall be eighteen months, two years, thirty months, or three years, and the maximum term shall be five years.

(C) Fines for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree or a felony of the first degree, not more than ten thousand dollars;

(2) For an aggravated felony of the second degree or a felony of the second degree, not more than seven thousand five hundred dollars;

(3) For an aggravated felony of the third degree or a felony of the third degree, not more than five thousand dollars;

(4) For a felony of the fourth degree, not more than two thousand five hundred dollars.

(D) Whoever is convicted of or pleads guilty to a felony of the third or fourth degree and did not, during the commission of that offense, cause physical harm to any person or make an

actual threat of physical harm to any person with a deadly weapon, as defined in section 2923.11 of the Revised Code, and who has not previously been convicted of an offense of violence shall be imprisoned for a definite term , and, in addition, may be fined or required to make restitution. The restitution shall be fixed by the court as provided in this section. If a person is convicted of or pleads guilty to committing, attempting to commit, or complicity in committing a violation of section 2909.03 of the Revised Code that is a felony of the third or fourth degree and is sentenced pursuant to this division, he shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

The terms of imprisonment shall be imposed as follows:

(1) For a felony of the third degree, the term shall be one, and one-half, or two years;

(2) For a felony of the fourth degree, the term shall be six months, one year, or eighteen months.

(E) The court shall require a person who is convicted of or pleads guilty to a violation of section 2921.41 of the Revised Code, in the circumstances described in division (C)(2) of that section, to make restitution for all of the property that is the subject of the offense, in accordance with division (C)(2) of that section. The court shall require, if appropriate, a person who is convicted of or pleads guilty to arson under section 2909.03 or to aggravated arson under section 2909.02 of the Revised Code to make restitution for all

or part of the property damage that is caused by his offense, which restitution shall be in addition to the penalties otherwise imposed by the court for a conviction or plea of guilty for arson or aggravated arson. The court, in any other case, may require a person who is convicted of or pleads guilty to a felony to make restitution for all or part of the property damage that is caused by his offense and for all or part of the value of the property that is the subject of any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, that the person committed. If the court determines that the victim of the offense was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the offense, the court shall, regardless of whether the offender knew the age of the victim, consider this fact in favor of imposing restitution, but this fact shall not control the decision of the court.

(F) No person shall be sentenced for an offense pursuant to division (B)(1)(b), (2)(b), or (3)(b) of this section because the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder unless the indictment, count in the indictment, or information charging him with the offense contains a

specification as set forth in section 2941.142 [2941.14.2] of the Revised Code.

(G) No person shall be sentenced pursuant to division (B)(6) or (7) of this section to an indefinite term of imprisonment for a felony of the third or fourth degree unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.143 [2941.14.3] of the Revised Code.

HISTORY: 134 v. H 511 (Eff 1-1-74); 137 v S 119 (Eff 8-30-78); 139 v S 199 (Eff 7-1-83); 140 v S 210(Eff7-1-83); 140 v H265 (Eff 9-20-84); 140 v S4 (Eff 9-26-84); 141 v H 284. Eff 3-6-86.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

I.

Whether this Court should review a state court's decision construing its own state law which constitutes independent and adequate state grounds?

II.

Whether this Court should review an issue which does not involve a novel constitutional question, and which addresses an issue which this Court has already resolved?

LIST OF PARTIES

Pursuant to Rules of the Supreme Court of the United States, Rule 21(1)(b), the parties to this case are listed below:

Counsel for Petitioner State of Ohio, PHILLIP D. BOGDANOFF, Assistant Prosecuting Attorney, 53 East Center Street, Akron, Ohio 44308.

Counsel for Respondents James A. Bowe and Wayne R. Adkins, J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325-2901.

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NO. 88-1229

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IN THE UNITED STATES SUPREME COURT

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October Term, 1988

STATE OF OHIO,

Petitioner,

-vs-

JAMES A. BOWE and WAYNE R. ADKINS,

Respondents.

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NINTH DISTRICT COURT OF APPEALS FOR SUMMIT COUNTY, OHIO

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondents, JAMES A. BOWE and WAYNE R. ADKINS, respectfully request that this Court deny the State's Petition for Writ of Certiorari.

OPINIONS BELOW

The Ohio Supreme Court denied the State's Motions for Leave to Appeal on November 23 and December 21, 1988 (Appendix, hereafter App., at A-1, 2).

The Court of Appeals for the Ninth District reversed the judgment of the trial court of Summit County on August 24, 1988 (App. at 3).

The Summit County Court of Common Pleas refused to suppress the evidence as indicated in the decision reproduced in the appendix at pages A-8.

JURISDICTION

Petitioner, STATE OF OHIO, claims jurisdiction under 18 U.S.C. § 1257(3). On December 4, 1987, the Court of Common Pleas for Summit County denied a motion to suppress the evidence. Respondents were then convicted of aggravated burglary. The

Court of Appeals for the Ninth District reversed the conviction on August 24, 1988, holding that the evidence was improperly seized under the Fourteenth Amendment. The Ohio Supreme Court refused to take jurisdiction of these cases on November 23 and December 21, 1988. Respondents pray that this Court deny the Petition for Writ of Certiorari for the reasons set forth below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment IV states:

> The right of people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons and/or things to be seized.

STATEMENT OF THE CASE

The Respondents, Mr. Bowe and Mr. Adkins, were each indicted in Akron, Ohio, on one count of aggravated burglary with a prior aggravated felony specification. Before the trial, Mr. Bowe and Mr. Adkins filed a Motion to Suppress Evidence that was seized by the police through a warrantless search. The trial court admitted the evidence, and on December 4, 1987, a jury found Messrs. Bowe and Adkins guilty of aggravated burglary. Mr. Adkins was sentenced to 12-25 years in the Ohio State Penitentiary, and Mr. Bowe was sentenced to 10-25 years in the Ohio State Penitentiary.

Mr. Bowe and Mr. Adkins appealed their convictions to the Ninth District Court of Appeals. The Court of Appeals reversed the convictions, holding that the trial court erred in overruling the Motion to Suppress Evidence.

The State of Ohio, petitioner here, filed a Motion for Leave to Appeal to the Ohio Supreme Court, which denied the motion.

On October 5, 1987, a home located at 1854 16th Street, Akron, Ohio, was broken into (Transcript, hereafter T., at 14). Kirk Lawson told police he saw two males going through the yard in that vicinity and gave a description of the men to the police (T. at 102). Ed Reese reported to the police that he observed two males leave in a car and gave the police the license plate number (T. at 122). Police went to the address for which the car was registered. Mr. Reese and Mr. Lawson were then taken to that address on Ira Avenue to identify possible suspects. They arrived at 313 Ira Avenue, a house consisting of two apartments, one upstairs and one downstairs (T. at 19). The police had secured the outside perimeter of the house, believing suspects were in the upstairs apartment. At this time, a total of five police officers were at the scene (T. at 27). Mr. Lawson testified that he heard the police tell the suspects that they [the police] would obtain a search warrant if the suspects in the

apartment did not come out (T. at 107). This testimony contradicted the police officers' testimony, which denied ever discussing a search warrant (T. at 41). Up to this point, no arrest was made.

The police, upon hearing a barking dog in the upstairs apartment, called on trained personnel to remove the dog (T. at 21). However, before this "trained personnel" arrived, a mere passerby was allowed to go into the upstairs apartment to remove the dog (T. at 22). Shortly thereafter, another passerby was allowed to go into the upstairs apartment and talk to the suspects. This person came down and told police that the suspects would be right down. A few minutes later, Respondent Bowe emerged; was identified by Mr. Reese and Mr. Lawson, arrested and read his **Miranda** warnings. Without obtaining a search warrant, four officers entered Mr. Bowe's apartment and searched for the other suspect, Respondent Adkins (T. at 39). After a lengthy search, Mr. Adkins was located in a closet. The police also seized jewelry, cameras, and video cassette recorders from Mr. Bowe's apartment.

Mr. Bowe and Mr. Adkins were charged with aggravated burglary. Both filed motions to suppress the evidence seized from the warrantless search. At the end of the suppression hearing, the State conceded that Mr. Bowe and Mr. Adkins lived at 313 Ira Avenue and had standing to challenge the warrantless search. At the evidentiary hearing, two officers testified that Mr. Bowe consented to the search of his apartment (T. at 26). However, Mr. Bowe denied giving consent and said the police told him that a search warrant was on the way. Several witnesses testified that they also heard the police tell Mr. Bowe that a search warrant was "on the way" (T. at 27). The trial judge concluded at the hearing that Mr. Bowe did not consent to the search of his apartment. However, the judge held that exigent circumstances justified the warrantless entry and search of Mr. Bowe's apartment. The trial court found exigent circumstances

based on the premise of the commission of a felony, police belief that the suspect was in the apartment and that the suspect might escape.

The Court of Appeals for the Ninth District reversed the judgment of the trial court, holding that no exceptions to the warrant requirement justifying a warrantless entry and search of Mr. Bowe's home existed (Court of Appeals Opinion at 6; App. at A-8). The appellate court found no circumstances to justify the warrantless entry and search of Mr. Bowe's home. Since the police had secured Mr. Bowe's apartment, an escape was highly unlikely at that point (Court of Appeals Opinion at 6; App. at A-8).

Thereafter, testimony regarding the discovery of the stolen property in Mr. Bowe's apartment was admitted at the joint trial of Mr. Bowe and Mr. Adkins. Both were then convicted of aggravated burglary.

REASONS FOR DENYING THE WRIT

I.

THIS COURT'S DECISION IN MULLANEY V. WILBUR, 421 U.S. 684 (1975), MANDATES THAT A STATE COURT'S DECISION IN INTERPRETING ITS STATE LAW IS BINDING AND IS NOT SUBJECT TO REVIEW WHEN A CONSTITUTIONAL ISSUE IS NOT INVOLVED. THEREFORE, THE STATE'S CONTENTIONS ARE WITHOUT MERIT.

This Court has repeatedly established the necessary elements for a warrantless search and seizure, which are clearly defined in **Payton v. New York**, 445 U.S. 573 (1980). When these requirements are violated, the Court has held that the fruits of such a search must be suppressed. **Silverthorne Lumber Co. v. United States**, 251 U.S. 385 (1920).

This Court held in **Payton v. New York** that in order for a warrantless nonconsensual search to meet the requirements of the Fourth Amendment, exigent circumstances must exist.

According to this Court's Rules Governing Review of Certiorari, Rule 17 states that reasons adequate for review include a decision which creates a conflict between the appellate courts, a decision which creates a conflict between state courts of last resort, or of a federal court of appeals, or a decision involving an important federal law question not yet resolved by this Court. None of these situations apply here.

The State's theory here is that state appellate courts are strictly bound by their state penal code in determining if an offense is a serious offense which will justify a warrantless search by the police.

In essence, the State is arguing that since Ohio has classified aggravated burglary as an "offense of violence," the State Court of Appeals was bound to find that exigent circumstances existed simply on that basis alone.

This position manifests a serious misreading of this Court's decision in **Welsh v. Wisconsin**, 466 U.S. 740 (1984), and undercuts the traditional authority of a state court to construe its own criminal statutes.

It has been well-established by this court that state courts are the "ultimate expositors" of state law. **Mullaney v. Wilbur**, 421 U.S. 691 (1975). This Court held in **Mullaney**: "We are bound by their constructions except in extreme circumstances not present here." **Id.** at 691. Thus, the State's supreme judicial court's construction of the state law prevailed.

In **Mullaney** the respondent was found guilty of murder and appealed to the Maine Supreme Judicial Court arguing he had been denied due process because he had to prove he acted in the heat of passion on sudden provocation in order to negate the elements of malice aforethought, as required under Maine's state law. The Maine Supreme Judicial Court rejected respondent's argument and allowed the prosecution to rest on implied malice aforethought.

Respondent then successfully petitioned the Federal District Court, which ruled the prosecution could not rely on a presumption of implied malice. The Court of Appeals for the First Circuit affirmed the District Court's holding.

Following this decision, the Maine Supreme Judicial Court decided a case which directly disputed the First Circuit's independent determination of Maine law. In view of this decision, this Court granted certiorari to Mullaney and remanded to the Court of Appeals for reconsideration. On remand, that court applied **Winship** again, but this time to the Maine law as construed by the Maine Supreme Judicial Court. The Court of Appeals held that **Winship** controlled, and this Court affirmed, accepting the Maine Supreme Judicial Court's construction of its state homicide law as binding.

This Court held that only on rare occasions would it re-examine a state court interpretation of state law. An exception would be when it appears to be an "obvious subterfuge to evade consideration of a federal issue." **Radio Station WOW, Inc. v. Johnson**, 326 U.S. 120, 129 (1945).

No subterfuge is present in this case, nor has the State alleged that the state courts engaged in subterfuge. Rather, the

State of Ohio is asking this Court to substitute its judgment on a matter of state law for that reached by the state court.

This Court has defined the term "exigent circumstances" in **Welsh v. Wisconsin**, 466 U.S. 740 (1984), requiring the state to prove an "urgent need" requiring a warrantless entry to arrest or search inside a private home (**Welsh** at 750). In order for exigent circumstances to exist, one of the following must be met:

1. an urgent need, as defined in **Welsh v. Wisconsin**;
2. an "emergency" situation, as defined in **Mincey v. Arizona**;
3. the "hot pursuit" exception as defined in **Mincey**; or
4. the police must be faced with possible removal or destruction of the evidence, as explained in **Mincey**.

This Court in **Welsh** stressed the importance of the gravity of the offense when examining a warrantless search and referred to **People v. Sanders**, 59 Ill. App.3d 6, 374 N.E.2d 1315 (1978), which held that burglary without weapons is not a grave offense of violence so as to permit a warrantless search. The Court went on to state in **Welsh** that no exigent circumstance is created merely because there is probable cause to believe a serious crime has been committed.

The State seeks to justify the warrantless search here of a private home on this basis. However, the offense in the case at bar is similar to **Sanders**, which did not allow a warrantless search. In both situations, the offense did not involve any weapons, or any violence. Thus, the gravity of the underlying offense is not severe enough to justify a warrantless search, as this Court requires under **Welsh**.

The Ninth District Court of Appeals reversed the trial courts' findings and suppressed the evidence. The appellate court based its ruling on **Welsh v. Wisconsin**, 466 U.S. 740 (1984), and acknowledged that the seriousness of the offense was a consideration in determining whether exigent circumstances exist. The appellate court held that "in the instant case, no

violence was involved; there was no testimony that the appellants were armed at the time they burglarized the home or while they were in the apartment." (Court of Appeals Opinion at 5; App. at A-7)

In the present case, there was no "urgent need" to enter Mr. Bowe's apartment. The police were able to wait around while various people walking by attempted to remove a dog from Mr. Bowe's apartment. The police also allowed Mr. Bowe's mother and another person to go up separately to Mr. Bowe's apartment to locate him. This would not have been allowed had an actual urgent situation demanding immediate action existed. From the time the police arrived at Mr. Bowe's apartment, approximately an hour and a half elapsed. During this time, the police secured Mr. Bowe's apartment, and after about an hour, conducted a 10-15 minute search of Mr. Bowe's apartment.

This Court has also already established the exceptions to the warrant requirement. In **Mincey v. Arizona**, 437 U.S. 385, 390 (1978), this Court defined an "emergency" situation as a situation where "immediate aid" for the person in the home was required, or where the situation was "threatening life or limb." Id. at 392-393. In the case at bar, there is no suggestion from the facts that an emergency situation existed.

This Court went on to state in **Mincey** that a search incident to a lawful arrest was an exception to the warrant requirement. Id. at 394. However, that was not the situation in the present case.

The third exception to the warrant requirement that the court established in **Mincey** is "hot pursuit." In **Warden v. Hayden**, 387 U.S. 294 (1967), police entered a home less than five minutes after an armed robber. This Court held that the entry was in hot pursuit because a delay would have seriously endangered the lives of police and/or others. Id. at 298-299.

In the case at bar, the facts do not suggest that there was any possibility of danger to the police or to others. First

of all, the police allowed several people to go into Mr. Bowe's apartment as they stood by waiting for trained personnel to remove the dog from Mr. Bowe's apartment. Had there been an actual threat of danger, the police would not have allowed innocent people to enter Mr. Bowe's apartment.

The actions of the police refute any argument that a dangerous situation existed. In **Welsh v. Wisconsin, supra** at 750, this Court stated it only approved of warrantless arrests in a home under the "hot pursuit" exception. Therefore, this issue has already been resolved by this Court on numerous occasions.

The last exception established by this court in **Mincey, supra** involves a situation where police are faced with the immediate removal or destruction of the evidence. **Id.** at 394.

There must be a real threat of destruction or removal of the evidence. In the present case, the evidence (camera, VCRs, etc.) cannot be easily destroyed, and there is no indication that the police believed otherwise. The police were aware of the size and quantity of the evidence before they entered Mr. Bowe's apartment without a warrant.

Petitioner argues that under Ohio Revised Code 2929.11, aggravated burglary is an offense of violence. However, it is not necessarily the classification that counts, but more importantly, the facts of the case. The appellate court, relying on this Court's holding in **Welsh v. Wisconsin**, 466 U.S. 740 (1984), and the specific facts of the case at bar, held that in the instant case, no violence was involved.

The facts of this case establish that there was no violence involved in this offense. The gravity of this offense was not so great as to justify a warrantless search of a private home.

The appellate court was correct in its decision that no exception to the warrant requirement justifying a warrantless entry and search of Mr. Bowe's home existed under the exceptions defined by this court in **Welsh v. Wisconsin.**

CONCLUSION

As a result of the above arguments, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

J. DEAN CARRO
Counsel for Petitioner Bowe

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APPENDIX

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: November 23, 1988

State of Ohio,
Appellant,

v.

James A. Bowe,
Appellee.

Case No. 88-1781

ENTRY

Upon consideration of the motion for leave to appeal from the Court of Appeals for Summit County, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Lynn C. Slaby.

THOMAS J. MOYER
Chief Justice

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: December 21, 1988

State of Ohio,
Appellant,

v.

Wayne R. Adkins,
Appellee.

Case No. 88-1779

E N T R Y

Upon consideration of the motion for leave to appeal from the Court of Appeals for Summit County, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Lynn C. Slaby.

(Court of Appeals No. 13505)

THOMAS J. MOYER
Chief Justice

STATE OF OHIO)) ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO) Plaintiff-Appellee) v.) JAMES A. BOWE and WAYNE R. ADKINS) Defendants-Appellants)	C.A. NOS. 13494 13505 APPEALS FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT COUNTY OF SUMMIT, OHIO CASE NO. CR87 10 1282

DECISION AND JOURNAL ENTRY

Dated: August 24, 1988

These causes were heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CACIOPPO, J.

On October 5, 1987, a home located at 1854 16th St., Akron, Ohio, was broken into. Kirk Lawson told police he observed two males going through the yard in that vicinity and gave the police a description of the men. Ed Reese reported to the police that he observed two males leave in a car and gave the police the license plate number. Police went to the address of the license plate registrant. Reese and Lawson were taken to Ira Avenue to view possible suspects. They arrived at 313 Ira Avenue, a house which consisted of two apartments, one upstairs and one

downstairs. The police had secured the outside perimeter of the house, because they believed that the suspects were located in the upstairs apartment. From the time they received the license plate number, checked same and took witnesses to the address, no arrest warrant was obtained. The police heard the sound of a barking dog coming from the upstairs apartment and called trained personnel to remove the dog. However, before this personnel arrived, a passerby was allowed to go to the upstairs apartment and remove the dog. Shortly thereafter, another passerby was allowed to go to the upstairs apartment and speak to the suspects. This person came down and told police the suspects would be right down. A few minutes later, appellant, James Bowe, emerged; he was identified by Reese and Lawson, arrested and read his Miranda warnings. Before obtaining a search warrant, four officers entered the apartment and searched for the other suspect, appellant, Wayne Adkins, who was discovered in a closet, covered with two VCRs and some bags.

Bowe and Adkins were charged with aggravated burglary. Both appellants made motions to suppress the evidence seized from the warrantless search. At the end of the suppression hearing, the state conceded that Bowe and Adkins lived at 313 Ira Avenue, and thus, had standing to challenge the warrantless search. At the hearing, two officers testified that Bowe consented to the search of the premises. Bowe testified that he did not consent to the search, and witnesses testified that police told Bowe that they had a

search warrant on the way. Based upon this, the court found that there was no consent to the search of the premises.

However, the trial court upheld the search on the basis that there were exigent circumstances justifying the warrantless entry and search of the premises. The court found exigent circumstances to exist because there was a commission of a crime of violence, and the police had trustworthy information that the suspect was in the apartment and that he might escape. The appellants went to trial and the jury returned a verdict of guilty against both on the charge of aggravated burglary and sentenced them accordingly. From this decision, both appellants appeal. The appellants' appeals were consolidated for argument.

ADKINS' FIRST ASSIGNMENT OF ERROR

> "The trial court erred in overruling appellant's motion to suppress the evidence seized in the warrantless search of appellant's residence, where there was no consent to search given, and there were no exigent circumstances justifying the entry into the premises and the subsequent search of the property and seizure of items found therein."

BOWE'S ASSIGNMENT OF ERROR

> "The trial court erred to the prejudice of the defendant-appellant by overruling defendant-appellant's motion to suppress evidence seized by the police at 313 Ira Avenue, Akron, Ohio, on October 5, 1987, since such evidence was seized in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution."

It is unconstitutional for the police to make a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest, absent exigent circumstances. Payton v. New York (1980), 445 U.S. 573.

Warrantless searches are per se unreasonable absent specific exceptions. Mincey v. Arizona (1978), 437 U.S. 385, 390. In Mincey, the court noted the exceptions to the warrant requirement justifying a warrantless entry and search of the home.

The first such exception is an "emergency situation". Such a situation arises when a person in the home is in need of "immediate aid" or there is a situation "threatening life or limb". Id. at 392-393. Nothing in the record indicates that the emergency exception applies to this case. No one was in need of immediate aid and the actions of the police allowing civilian passersby to enter the appellants' apartment destroys any argument that this was a situation threatening life or limb.

The second exception noted in Mincey is where the search was incident to a lawful arrest. In the instant case, the search was conducted to locate and apprehend Adkins, thus, this exception is not applicable to this case.

A third exception is "hot pursuit". In Warden v. Hayden (1967), 387 U.S. 294, the police entered a home less than five minutes after the entry of an armed robber. The United States Supreme Court approved this entry because delay would have gravely endangered the lives of the police or the lives of others. Id. at 298-299. In the instant case, there was no evidence that the police or others were endangered. In fact, their actions, discussed supra, destroy any argument that a dangerous situation existed.

Finally, the last exception noted in Mincey is where the evidence could easily be removed or destroyed. Here, the evidence (VCRs, cameras and radios) is not of a type easily destroyed, and the record does not reflect any indication that the police thought otherwise.

The trial court followed Dorman v. United States (C.A. D.C. 1970), 435 F. 2d 385, which set forth six factors that would constitute an immediate major crisis mandating a warrantless entry of a home: (1) the offense involved is a crime of violence; (2) the suspect is reasonably believed to be armed; (3) a clear showing of probable cause to believe that the suspect committed the crime involved; (4) a strong reason to believe that the suspect is in the premises being entered; (5) the likelihood that the suspect will escape if not apprehended; and (6) the entry, though not consented, is made peaceably. Id. at 392-393.

"[A]n important factor to be considered in determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." Welsh v. Wisconsin (1984), 466 U.S. 740, 753. It has been held that a burglary without a weapon is not a grave enough offense to permit a warrantless home search or arrest. People v. Sanders (1978), 57 Ill. App. 3d 6, 374 N.E. 2d 1315 (cited in Welsh, supra, at 752). In the instant case, no violence was involved; there was no testimony that the appellants were armed at the time they burglarized the home or while

they were in the apartment. Thus, the first two factors under Dorman were not present in this case.

The third, fourth and sixth factors were present in this case. The police had reasonably trustworthy information that the persons in the apartment committed the burglary and the entry of the police was made peaceably. Finally, the fifth factor of a likelihood that the suspect would escape is not present. In the instant case, the police had secured all exits from the home. Due to this, it is not likely that Adkins could have escaped.

Thus, under Dorman and Mincey there were no exigent circumstances justifying the warrantless entry of the appellants' apartment. The court erred in denying the appellants' motions to suppress the evidence obtained from the warrantless search.

The appellants' first assignments of error are well taken.

ADKINS' SECOND ASSIGNMENT OF ERROR

> "The trial court erred in denying appellant's timely request for jury instructions as to the offenses of burglary and grand theft."

Due to our disposition of his first assignment of error, we need not discuss Adkins' final assignment of error.

The judgment of the trial court is reversed and the cause is remanded to the trial court for proceedings consistent with this opinion and law.

The Court finds that there were reasonable grounds for these appeals.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

Mary Cacioppo

MARY CACIOPPO
FOR THE COURT

BAIRD, P. J.
MAHONEY, J.
CONCUR

APPEARANCES:

MARC R. WOLFF, Asst. Prosecutor, City-County Safety Bldg., Akron, OH 44308 for Plaintiff.

VINCENT J. ALFERA, Attorney at Law, 77 E. Mill St., Akron, OH 44308 for Defendants.

RICHARD S. KASAY, Attorney at Law, 716 Graham Rd., Cuyahoga Falls, OH 44221 for Defendants.

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

STATE OF OHIO) CASE NO. 87-10-1282(A)(B)
)
Plaintiff,) C.A. NOS. 13494 & 13505
)
-vs-)
) Motion to Suppress
JAMES A. BOWE)
WAYNE R. ADKINS) Volume 1 of 3
)
Defendants.)

* * *

EXCERPT FROM TRIAL COURT PROCEEDINGS

Trial Courts Findings of December 4, 1987, regarding Motion to Suppress.

* * *

THE COURT: All right. Gentlemen, first the Court does find that there was no consent to search based upon the evidence presented.

Secondly, in reference to suppressing the identification of the Defendants, the Court finds and there have been numerous cases on one on one identification in the past and the Court finds that this identification was

valid, was not unnecessarily suggestive or conducive to irreparable mistaken identification.

The second part of the motion was on the suppression of any statement given and that has been made mute by the prosecutor saying no statement will be used on their case in chief.

Third, suppressing the evidence that was found in the search of this apartment. The Court finds that the police had a right to make that search in attempting to make an arrest of Adkins in that apartment.

The Court finds that there was exigent circumstances, that there was a commission of a crime of violence, the trustworthy information that they had showed that Adkins and I guess at that time they didn't know his name, but that he was on the premises and that he might escape.

Their evidence indicated that Adkins had committed a crime so the Court finds that the entry without permission was permissible under the law to effect the arrest of Adkins.

The testimony shows that the evidence that they found was in plain view and that was permissible also because it was in plain view. Therefore, I'm denying your motion to suppress. Basically it's based on Dorman.

Is there anything further?

* * *

§ 2929.11 Penalties for felony.

(A) Whoever is convicted of or pleads guilty to a felony other than aggravated murder or murder, except as provided in division (D) or (E) of this section, shall be imprisoned for an indefinite term and, in addition, may be fined or required to make restitution, or both. The indefinite term of imprisonment shall consist of a maximum term as provided in this section and a minimum term fixed by the court as provided in this section. The fine and restitution shall be fixed by the court as provided in this section.

Whoever is convicted of or pleads guilty to committing, attempting to commit, or complicity in committing a felony violation of section 2909.02 or 2909.03 of the Revised Code and is sentenced to an indefinite term of imprisonment shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

(B) Except as provided in division (D) of this section, section 2929.71, and Chapter 2925. of the Revised Code, terms of imprisonment for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be five, six, seven, eight, nine, or ten years, and the maximum term shall be twenty-five years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of ten, eleven, twelve, thirteen, fourteen, or fifteen years, and the maximum term shall be twenty-five years;

(2) For an aggravated felony of the second degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be three, four, five, six, seven, or eight years, and the maximum term shall be fifteen years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of eight, nine, ten, eleven, or twelve years, and the maximum term shall be fifteen years;

(3) For an aggravated felony of the third degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be two, three, four, or five years, and the maximum term shall be ten years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of five, six, seven, or eight years, and the maximum term shall be ten years;

(4) For a felony of the first degree, the minimum term shall be four, five, six, or seven years, and the maximum term shall be twenty-five years;

(5) For a felony of the second degree, the minimum term shall be two, three, four, or five years, and the maximum term shall be fifteen years;

(6) For a felony of the third degree, the minimum term shall be two years, thirty months, three years, or four years, and the maximum term shall be ten years;

(7) For a felony of the fourth degree, the minimum term shall be eighteen months, two years, thirty months, or three years, and the maximum term shall be five years.

(C) Fines for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree or a felony of the first degree, not more than ten thousand dollars;

(2) For an aggravated felony of the second degree or a felony of the second degree, not more than seven thousand five hundred dollars;

(3) For an aggravated felony of the third degree or a felony of the third degree, not more than five thousand dollars;

(4) For a felony of the fourth degree, not more than two thousand five hundred dollars.

(D) Whoever is convicted of or pleads guilty to a felony of the third or fourth degree and did not, during the commission of that offense, cause physical harm to any person or make an actual threat of physical harm to any person with a deadly weapon, as defined in section 2923.11 of the Revised Code, and who has not previously been convicted of an offense of violence shall be imprisoned for a definite term, and, in addition, may be fined or required to make restitution. The restitution shall be fixed by the court as provided in this section. If a person is convicted of or pleads guilty to committing, attempting to commit, or complicity in committing a violation of section 2909.03 of the Revised Code that is a felony of the third or fourth degree and is sentenced pursuant to this division, he shall be required to reimburse agencies for their investigation or prosecution costs in accordance with section 2929.28 of the Revised Code.

The terms of imprisonment shall be imposed as follows:

(1) For a felony of the third degree, the term shall be one, one and one-half, or two years;

(2) For a felony of the fourth degree, the term shall be six months, one year, or eighteen months.

(E) The court shall require a person who is convicted of or pleads guilty to a violation of section 2921.41 of the Revised Code, in the circumstances described in division (C)(2)(a) of that section, to make restitution for all of the property that is the subject of the offense, in accordance with division (C)(2) of that section. The court shall require, if appropriate, a person who is convicted of or pleads guilty to arson under section 2909.03 or to aggravated arson under section 2909.02 of the Revised Code to make restitution for all or part of the property damage that is caused by his offense, which restitution shall be in addition to the penalties otherwise imposed by the court for a conviction or

plea of guilty for arson or aggravated arson. The court, in any other case, may require a person who is convicted of or pleads guilty to a felony to make restitution for all or part of the property damage that is caused by his offense and for all or part of the value of the property that is the subject of any theft offense, as defined in division (K) of section 2913.01 of the Revised Code, that the person committed. If the court determines that the victim of the offense was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the offense, the court shall, regardless of whether the offender knew the age of the victim, consider this fact in favor of imposing restitution, but this fact shall not control the decision of the court.

(F) No person shall be sentenced for an offense pursuant to division (B)(1)(b), (2)(b), or (3)(b) of this section because the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.142 [2941.14.2] of the Revised Code.

(G) No person shall be sentenced pursuant to division (B)(6) or (7) of this section to an indefinite term of imprisonment for a felony of the third or fourth degree unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.143 [2941.14.3] of the Revised Code.

HISTORY: 134 v H 511 (Eff 1-1-74); 137 v S 119 (Eff 8-30-78); 139 v S 180 (Eff 7-1-83); 140 v S 210 (Eff 7-1-83); 140 v H 385 (Eff 9-30-84); 140 v S 4 (Eff 9-28-84); 141 v H 284. Eff 3-6-86.